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No. 92-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN R. O'NEILL, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent, the National Labor Relations Board ("Board"), asserts first that this Court's prior decisions do not establish common ownership as a prerequisite to a finding of alter ego status, and second that the lower courts are not in conflict on this issue. Neither assertion withstands analysis.[1]

1. Respondent sets forth three reasons in support of its contention that alter ego liability can be imposed even in the absence of overlapping ownership of the predecessor and successor corporations. First, respondent stresses that the *Howard Johnson* Court "referred to 'ownership *or management*,' " and asked whether " 'the sale of the [business operation] by [the predecessor corporation] to [the successor] was in any sense a paper transaction without any meaningful impact on the ownership *or operation* of the enterprise.' " Opp. at 8 (quoting *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 n.5 (1974) (emphasis added)). Respondent simply misreads these passages from *Howard Johnson* for the proposition that alter ego liability may be imposed on the

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[1] Respondent suggests that petitioners' claim is not properly presented, asserting that it was not raised until a petition for rehearing was filed in the court below. Opp. at 7 n.2. This assertion is both incorrect and irrelevant. Petitioners asserted in their primary brief before the Ninth Circuit that the lack of common ownership between the predecessor and successor corporations precluded a finding that the two groups of corporations were alter egos. *See* Opening Brief of O'Neill, *et al.*, at 9. In any event, the Ninth Circuit squarely held in this case that "common ownership" "need not be present." Pet. App. at 170a. Respondent's novel position that this Court may not decide a question that was both raised and decided below is, therefore, insupportable.

basis of either common ownership of the business or common management of its operations. The *Howard Johnson* Court stated that the sale of a business could be considered a "paper transaction" if it was "without meaningful impact on the ownership or operation of the enterprise." 417 U.S. at 259 n.5. It follows that if the sale of a business has a "meaningful impact" on *either* "the ownership *or* operation of the business," then the sale cannot be considered a "paper transaction" and thus cannot support the imposition of alter ego liability.

In this case, it is undisputed that the predecessor and successor corporations were separately owned. Respondent so concedes. Opp. at 4. Further, as the court below acknowledged, "it is undisputed that O'Neill did not own any of the new companies." Pet. App. at 171a. *See also* Pet. App. at 1a-2a. Thus, in this case, it is indisputable that the transfer of the business from the predecessor to the successor corporations had a "meaningful impact," indeed, a wholly dispositive impact, on the ownership of the business. Under *Howard Johnson*, therefore, the transfer of the business cannot be said to be a mere "paper transaction"—the finding necessary under *Howard Johnson* to support the imposition of alter ego liability.[2]

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[2] The *Howard Johnson* Court's refusal to find alter ego status is especially significant in light of the fact that the case involved a claim for arbitration under § 301 of the Labor Management Relations Act. As this Court has stressed, doubts as to the coverage of an arbitration clause should be resolved in favor of arbitration. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Because this case involves only an alleged unfair labor practice under § 8 of the NLRA, it follows *a fortiori* that alter ego liability is not warranted here.

Second, respondent states that the *Howard Johnson* Court "did not purport to define the contours of [the alter ego] doctrine," but rather merely "referred to *Southport Petroleum*, *supra*, the seminal case in the field." Opp. at 8. Respondent then quotes *Southport Petroleum* out of context in asserting that "an allegation of separate ownership would not defeat a finding of alter ego liability because it 'does not negative either the possibility that the stock in the [successor] corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the [predecessor] corporation or its stockholders, or that its stock was held by straw men.' " Opp. at 8-9 (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 105 (1942)).

Nothing in the quoted passage, however, is inconsistent with *Southport Petroleum*'s express recognition that alter ego liability cannot be imposed when there has been "a true change of ownership." 315 U.S. at 106. The passage relied upon by respondent requires a better understanding of the unique procedural posture of that case. In *Southport Petroleum*, a Texas corporation had been ordered by the Board to remedy unfair labor practices committed in connection with its operation of a refinery. The corporation failed to comply with the Board's order, and instead "distributed all of its assets to its *four stockholders* as a liquidating dividend." *Id.* at 103 (emphasis added). In addition, "the *two stockholders* who received the Texas City refinery conveyed it to a newly organized Delaware corporation whose stockholders were at no time stockholders of the Texas corporation." *Id.* (emphasis added)

After the Board filed a petition in the court of appeals for enforcement of its order, the corporation filed an application with the court for leave to submit additional evidence of the liquidation and transfer. The Fifth Circuit held that the dissolution had "no effect upon this proceeding" because under Texas law a corporation that has been dissolved may continue to sue and be sued for three years. *NLRB v. Southport Petroleum Co.*, 117 F.2d 90, 92 (5th Cir. 1941). Accordingly, the court enforced the Board's order. *Id.*

This Court "granted certiorari limited to the question of the propriety of the denial of the [application to adduce additional evidence]." 315 U.S. at 104. The Court held that denial of the application "was addressed to the sound judicial discretion of the court, and . . . was not error." *Id.* In support of this holding, the Court noted that even if all of the allegations in the application were true, the application would not be "material" under § 10(e) of the NLRA, 29 U.S.C. § 160(e), because the allegations, standing alone, did not clearly establish "a true change of ownership." *Id.* at 106. Specifically, this Court noted that the allegations did not "negative either the possibility that the stock in the [successor] corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the [predecessor] corporation or its stockholders, or that its stock was held by straw men." *Id.* at 105. Accordingly, this Court affirmed the Fifth Circuit's denial of the application to adduce additional evidence, and left it to the Board or to the court in the event of further proceedings to resolve the "question of fact" "[w]hether there was a *bona fide* discontinuance and

a true change of ownership." *Id.* at 106; *see id.* at 107 ("all we hold is that there has not been a sufficient showing by petitioner to negative the possibility which we note").

Thus, respondent's reliance on *Southport Petroleum* is misplaced. That case does not support respondent's position that alter ego liability may be imposed in the absence of common ownership. To the contrary, this Court expressly stated in *Southport Petroleum* that "a true change of ownership . . . would terminate the duty of reinstatement created by the Board's order." 315 U.S. at 106.

Third, respondent asserts that "whether one corporation is the alter ego of another is 'a question of fact properly to be resolved by the Board.' " Opp. at 9 (quoting *Southport Petroleum*, 315 U.S. at 106). What respondent fails to acknowledge—and indeed contradicts—is that the question of fact to be resolved is whether there has been "a true change of ownership." *Southport Petroleum*, 315 U.S. at 106. Rather, relying on several Board and lower court opinions, respondent merely asserts that the alter ego determination depends on "a multi-factor analysis," in which "[n]one of the factors alone is controlling, nor is any factor a necessary prerequisite for a finding of alter ego status." Opp. at 9. The validity of this latter assertion is the *question of law* presented by this petition.

2. Respondent also asserts that the lower courts are not in conflict, and that "no court has adopted petitioners' position that, as a general rule, common ownership is a legal prerequisite to a finding of alter ego status." Opp. at 11-12. This assertion is simply wrong. For example, in *Amalgamated Meat Cutters*

v. NLRB, 663 F.2d 223 (D.C. Cir. 1980), the D.C. Circuit found that all of the factors necessary to support a finding of alter ego status were present with one exception. As the court noted, "[t]he missing element in the instant case is, of course, ownership." *Id.* at 227. Because common ownership was absent, the court held that alter ego liability could not be imposed.[3] Likewise, in *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147 (9th Cir. 1989), the Ninth Circuit stated that "a threshold determination must be made in every alter ego case: whether both companies are substantially owned and controlled by identical parties." *Id.* at 1150. *Accord NLRB v. Campbell-Harris Electric, Inc.*, 719 F.2d 292, 296 (8th Cir. 1983) (requiring "sufficient identity in ownership to evince an alter ego relationship").

Petitioners recognize that not all courts of appeals agree that common ownership is necessary to a finding of alter ego status. *See, e.g.*, Pet. App. at 170a (common ownership "need not be present"); *NLRB v. Omnitest Inspection Services, Inc.*, 937 F.2d 112, 118 (3d Cir. 1991) ("substantial identity of formal ownership between two employers is not the *sine qua non* of an alter ego relationship"). However, it is precisely because of the square conflict between such cases, on the one hand, and those relied upon by

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[3] Respondent fails to respond to petitioners' observation that *Amalgamated Meat Cutters* indisputably remains the law of the D.C. Circuit and has not been overruled. *See* Pet. at 14 n.5. Therefore, respondent's invocation of *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416 (D.C. Cir. 1984), does not, and indeed cannot under well-established D.C. Circuit precedent, diminish the square conflict between the D.C. Circuit's decision in *Amalgamated Meat Cutters* and the Ninth Circuit's decision below.

petitioners, on the other, that further guidance from this Court is necessary.

3. Finally, respondent denies, by *ipse dixit*, that imposition of alter ego liability in the absence of common ownership would have a substantial chilling effect on otherwise routine asset transfers. Respondent asserts that alter ego liability will not attach "where there is 'a *bona fide* discontinuance and a true change of ownership,'" Opp. at 11 n.4 (quoting *Southport Petroleum*, 315 U.S. at 106), and will only be imposed "where, as here, there is 'a mere technical change in the structure or identity of the employing entity'." Opp. at 11 n.4 (quoting *Howard Johnson*, 417 U.S. at 259 n.5). But if, as respondent contends, alter ego liability may be imposed in the absence of common ownership, then corporations can have no assurance that the transfer of a business or its assets will not give rise to alter ego liability.

For example, under the approach adopted by the court below, the companies involved in *Howard Johnson* might well have been held to be alter egos. As Justice Douglas' dissent in that case stressed:

> The contract between the [predecessors] and the Union explicitly provided that successors of the [predecessors] would be bound, and certainly there can be no question that there was a substantial continuity—indeed identity—of the business operation under Howard Johnson, the successor employer. Under its franchise agreement Howard Johnson had substantial control over the [predecessors'] operation of the business; it was no stranger to the enterprise it took over. The business

> continued without interruption at the same location, offering the same products and services to the same public, under the same name and same manner, with almost the same number of employees. The only change was Howard Johnson's replacement of the Union members with new personnel. . . .

417 U.S. at 266-67 (Douglas, J., dissenting) (footnotes omitted). Under the "flexible and fact-specific . . . alter ego inquiry" advocated by respondent, Opp. at 12—under which common ownership is not necessary to a finding of alter ego status—Howard Johnson could have had no assurance that its purchase of the business would not subject it to liability as the alter ego of the predecessor. Such uncertainty would undoubtedly have chilled legitimate business activity like that in *Howard Johnson* and *Amalgamated Meat Cutters*.

The NLRB, and the court below, have lost sight of this Court's teaching that common ownership is the *sine qua non* of alter ego liability. This Court should grant the petition to resolve the conflict among the lower courts and to remove the uncertainty created by the use of a "flexible and fact-specific . . . alter

ego inquiry" rather than a bright-line test requiring, as a threshold finding, common ownership.

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Respectfully submitted,

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